No. 87-1729

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE, CHARTERED,
Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

*Peter Van N. Lockwood
Graeme W. Bush
Albert G. Lauber, Jr.

CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 862-5000

*Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF AUTHORITIES

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We file this brief, pursuant to this Court's Rule 22.6, in response to the Solicitor General's Supplemental Brief in this case and to the filings by the Solicitor General and the respondent in *United States v. Monsanto*, No. 88-454 (petition for cert. pending).[1] We also wish to bring to the Court's attention a recent court of appeals decision of relevance to the questions presented here.

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[1] We are providing the respondent in *Monsanto* with a copy of this brief.

1. We agree with the Solicitor General's submission in his Supplemental Brief (at 4-7) that certiorari should be granted both in the instant case and in *Monsanto*. We disagree, however, with his suggestion (Supp. Br. 7) that the cases should be consolidated for oral argument. Although the Sixth Amendment issues in the two cases are ultimately similar, the cases are sufficiently different, owing to their respective post-conviction and pre-trial contexts, that divergent legal analyses may apply. We believe that a single consolidated argument in these circumstances would be inadequate and possibly confusing. In this respect, the instant cases resemble the two drug-testing cases currently before the Court (*NTEU v. Von Raab*, No. 86-1879, and *Burnley v. Railway Labor Exec. Ass'n*, No. 87-1555), which the Court has ordered to be argued seriatim. See 56 U.S.L.W. 3831 (May 31, 1988).

We thus agree with the respondent in *Monsanto* (Br. in Opp. in No. 88-454, at 14) that the instant case and *Monsanto* should "be heard 'in tandem', with separate briefs and separate oral argument." If the Court declines this suggestion, we think that consolidation is the next best alternative. It is extremely important to the Government and the Bar that this Court decide the validity of attorney-fee forfeiture *both* in the pre-trial *and* in the post-conviction setting. If the Court were to grant review in one case and hold the other, there is a substantial possibility that its decision would not resolve both issues, leading to piecemeal litigation that the lower courts can ill afford. Should the Court choose not to accord two hours of total argument time to the questions presented, therefore, we urge that the Solicitor General's suggestion of consolidation be adopted.

2. In opposing certiorari in *Monsanto*, the respondent suggests (Br. in Opp. in No. 88-454, at 12-13) that this Court should defer granting review "to allow Congress to consider the question in the first instance." This suggestion is completely unrealistic. The committee hearings cited by the respondent (*id.* at 12) date largely from 1985. As far as we are aware, there are no bills currently pending in Congress that even address the questions presented here; the respondent in *Monsanto* certainly cites none. Under these circumstances, the prospect of legislative resolution is both speculative in fact and remote in time. Given the perplexity that now exists in the lower courts—a point we address below—this remote possibility should be accorded no weight in this Court's decision about certiorari.

3. A panel of the Seventh Circuit recently issued a decision on the constitutionality of attorney-fee forfeiture. *See United States v. Moya-Gomez et al.*, Nos. 87-1262, 87-1280, 87-1310, 87-1390 & 87-1670 (Sept. 30, 1988) (available at 1988 Westlaw 103424). The court there rejected a Sixth Amendment challenge to the application of the forfeiture statute. But it sustained a Fifth Amendment challenge, holding that "the present statutory scheme * * * violates the due process clause when it results in preventing the defendant from using the restrained funds to secure the services of counsel of choice" (slip op. 35).

The Seventh Circuit's ruling compounds the confusion in the courts of appeals. Six circuits have now ruled on the questions presented here. No circuit has agreed precisely with any other as to the proper mode of constitutional analysis, or as to the procedures to

be followed when a defendant faced with a forfeiture count seeks to retain private counsel.

These facts show the error of the respondent's suggestion in *Monsanto* (Br. in Opp. in No. 88-454, at 10) that certiorari should be denied because "further percolation and ongoing dialogue among the lower courts might well be fruitful." The "percolation" rationale for deferring certiorari is that the courts of appeals, if left to their own devices, will eventually settle upon a single, coherent resolution. The courts show no evidence of moving in that direction here. Quite the contrary: each successive decision has spun off on a new tangent, increasing the level of entropy in the system. The courts of appeals are undeniably in disarray, and this disarray is intolerable for district courts that must decide daily how criminal defendants shall be justly represented.

CONCLUSION

For these reasons and those stated in our petition, the petition for a writ of certiorari should be granted, and the case should be set for argument in tandem with *United States v. Monsanto*, No. 88-454 (petition for cert. pending).

Respectfully submitted,

*Peter Van N. Lockwood
Graeme W. Bush
Albert G. Lauber, Jr.

CAPLIN & DRYSDALE, CHARTERED
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 862-5000

*Counsel of Record

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